SUPREME COURT, U.S.
AUG 29 1974
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1974

No. 74-199

HAROLD E. L. BARTON,
Petitioner,

v.

ROGERS C. B. MORTON, Secretary of the Department of the Interior of the United States of America.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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# INDEX TO PETITION FOR CERTIORARI


| | Page |
|---|---|
| Petition for Writ of Certiorari | 1 |
| Opinions Below | 2 |
| Jurisdiction | 3 |
| Question Presented | 3 |
| Constitution and Statutes | 3 |
| Statement of the Case | 4 |
| Reasons for Granting the Writ | 7 |
| A. After discovery under the "prudent man rule" (reasonable prospect of success in developing a valuable mine), there is no room to require that a mining claimant demonstrate by demonstrative evidence the value of the deposit by exploiting or mining the deposit. | 7 |
| B. The demonstrative evidence test presents a conflict with the decisions of the Supreme Court upholding the "prudent man rule". | 7 |
| C. The demonstrative evidence test is a departure by agency action from established practice which requires correction by the courts on judicial review. | 8 |
| D. Unpatented mining claims are property in the highest sense of the term and constitutionally protected. Agency action which establishes a demonstrative evidence by exploitation test destroys title to many valid unpatented mining claims. | 9 |

Page

Conclusion: If demonstrative evidence rule prevails, it creates additional agency power where three branches of government have been merged - absolute discretionary power. 9

INDEX OF CASES

Cameron v. United States, 352 U.S. 450 (1920) 7

Castle v. Womble, 19 L.D. 455 (1894) 7, 8

Chrisman v. Miller, 197 U.S. 313 (1905) 7

Cole v. Ralph, 252 U.S. 286 (1920) 7

Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963) 7

Jefferson-Montana Copper Mines Co., 41 L. D. 302 (1912) 7

U.S. v. Coleman 390 U.S. 599 (1968) 7

Wilbur v. United States ex rel. Krushmic, 320 U.S. 306 (1930) 9

Constitution and Statutes

Fifth Amendment to Constitution of the United States 2

Minerals Policy Act of 1970, 84 Stat. 1876 9

28 USC 1254 (1) 62 Stat 928 3

30 USC 22 3

30 USC 23 3

Index of Authorities Cited (continued)


| | Page |
|---|---|
| 30 USC 29 | 3 |
| **Periodicals - Treatises** | |
| Congressional Record Vol 120 No 18 S 1911-S 1912 | 10 |
| Utah Law Review, Vol 1968 No. 1 p. 114 "Government Initiated Contests Against Mining Claims---a Continuing Conflict" | 10 |

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Harold E. L. Barton, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit. The Court below affirmed the decision of the United States District Court for the District of Oregon. The District Court affirmed the decision of the Secretary of the Interior on judicial review of his administrative action.

## OPINIONS BELOW

The 1974 opinion of the Court of Appeals for the Ninth Circuit (Appendix , infra, pp. A 41 to A 47) is reported. Harold E. L. Barton, v. Rogers C. B. Morton, Secretary of the Department of the Interior of the United States of America, No. 71-1991, May 30, 1974.

The 1971 opinion of the United States District Court for the District of Oregon (Appendix infra, pp. A 38-A 40. is not reported.

The 1967 opinion for the United States Department of the Interior, Office of the Secretary, by the Assistant Solicitor, Land Appeals, (Appendix, infra , pp. A21 to A 37 A-30659 is reported

The 1962 opinion of the Assistant Director Bureau of Land Management, reversing the Hearing Examiner, (Appendix, infra, pp. A 11 to A20 is unpublished.[1]

The 1961 opinion of the Hearing Examiner Bureau of Land Management (Appendix, infra, (Contest No. 05987 Oregon) is unpublished.[2]

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1/ Unpublished copy may be obtained from United States Department of the Interior, Director, Bureau of Land Management, Office of the Solicitor Oregon 05987 Nov. 2, 1962.

2/ Unpublished copy may be obtained from United States Department of the Interior, Contest No. 05987 Oregon October 26, 1961.

The judgment of the United States Court of Appeals for the Ninth Circuit to be reviewed is dated and was entered May 30, 1974. Rehearing was denied July 5, 1974.

## JURISDICTION

Title 28 U.S.C. 1254 (1) as revised by the Act of June 25, 1948, Chapter 646 (62 Stat. 928) is believed to confer on the Supreme Court of the United States jurisdiction, in its discretion, to review this case by writ of certiorari.

## QUESTION PRESENTED

Whether a mining claimant is required to exploit his mineral deposit and mine it to demonstrate certainty of its value by demonstrative evidence in order to validate his claim.

## CONSTITUTION AND STATUTES

The Fifth Amendment to the Constitution of the United States, which protects property against taking without compensation, is sufficiently familiar to the Court as not to require quotation.

The pertinent portions of the applicable statutes (Mining Law of 1872) are as follows:

41 Stat. 437 (30 U.S.C. 22)"...all valuable mineral deposits in lands belonging to the United States, ...chall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase..."

17 Stat. 91 (30 U.S.C. 23) "Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver,...or other valuable deposits,..."

6, 17 Stat. 92 Act of May 10, 1872, (as amended) (30 U.S.C.29 "A patent for any land

claimed and located for valuable deposits may be obtained in the following manner:..."

## STATEMENT OF THE CASE

Harold E. L. Barton, geologist, and Kenneth O. Watkins, mining engineer (deceased) filed application for mineral patent Oregon 05987 for the Elephant Mountain Nos. 1 and 4, Elephant No. 2 and Grub Stake lode mining claims Mineral Survey No. 949.

The Government granted patents to Elephant Mountain No. 4 and Grub Stake claims. The patents contained a timber reservation in accordance with the provisions of the O & C Act of April 8, 1948 (62 Stat 152). Both contested and uncontested claims form one economic group and are served by common workings. The mine is in parts of Sections 2,3,10 and 11, Township 22 South, Range 1, East W.M. in the Bohemia Mining District, Umpqua National Forest, Lane County, Oregon.

Claims to the north, east, south and west of the contested claims have either been patented or have been clearlisted for patent. The administrative law judge found that the Bohemia Mining Disrrict is one of the principal mineralized areas on the West slope of the Cascade Range; that witnesses for the mining claimants had (spent) more time on the claims and had greater opportunity to observe the claims than the Government witnesses, and that their testimony to the effect that the veins on the two Elephant claims are extensions of other veins on claims to the east and west is more persuasive than the testimony on the same subject offered by the Government witnesses. (A 7, 8).

The parties are in general agreement regarding the general geology, occurrence of mineral and the historic background of the mining district. (A 1). The testimony of the Government engineers was not necessarily inconsistent with that of the witnesses for the mining claimants. (A 2,3,).

On Claim No. 1, a vein in an oxidized zone is exposed in two adits near the east end line, in an outcropping 300 feet to the west, and in an adit 100 feet further west. On the No. 2 claim, an adit along the lode line in the east half of the claim exposes a vein structure which Mr. Suchy, minerals examiner for the Government, described as both strong and competent. (A 3).

The Government witnesses testified at the first hearing before the administrative law judge that they were unable to project the veins on the adjoining claims into the two contested claims. (A 4). However, Mr. Suchy, chief minerals examiner for the Government, testified at the second hearing that he had been on the claims again and had traced the veins across Elephant No. 2 easterly into the Elephant Mountain No. 4. (Hearing Examiner's second opinion of December 2, 1964 p. 2 ). Elephant Mountain No. 4 is one of the claims which was clearlisted and patent was issued for it.

The Examiner agreed with the witnesses that further work along the veins is warranted. But he concluded that the claims were null and void for lack of discovery of a valuable mineral deposit. (A 8, 9).

The Assistant Director, Bureau of Land Management, reversed the administrative law judge and held against the Bureau and for the mining claimants. He found:

> "After careful consideration of all of the...testimony concerning the strength of the structures or veins on the claims and the assays of samples taken from the exposure as well as the characteristics of veins in the mining district, we are persuaded that the record supports a conclusion that a prudent man would be warranted in expending his time and money in sinking on, or tunneling into the veins on these claims with a reasonable prospect of developing a paying mine." (A 20).

Mining claimants discovered an ore shoot with two dimensions physically exposed. High grade ore containing gold values as high as $72 an ounce, with the price of gold at $35 per ounce, was sampled at measured intervals. Channel samples were cut across the width of the ore shoot for widths up to thirty inches for a length of forty feet along the strike. Tr 160, Exhibit 9, Exhibit S-1. The chief mineral examiner for the Government agreed that the ore shoot would extend for a depth of at least 150 feet. Tr 151.

The differences between the Government's engineeers and the mining claimants about the veins on the Elephant No. 4 being an extension of the veins on adjoining claims at the first hearing were resolved in favor of the mining claimants at the second hearing, after the Government's engineer had reexamined the property. The only remaining difference is not whether a valuable block of ore exists, but how it should be mined. The Government engineers would sink on the ore shoot. The mining claimants would tunnel below the ore shoot and stope the ore above.

The Circuit Court adopted the opinion of the Assistant Solicitor written for the Secretary 1

1/ The Solicitor's Office was also counsel for the Government at the administrative hearings.

that after mineral discovery has been made, there is room to require proof by demonstrative evidence through actual exploitation that the deposit is valuable.

REASONS FOR GRANTING THE WRIT

A. After discovery under the "prudent man rule" (reasonable prospect of success in developing a valuable mine", there is no room to require that a mining claimant demonstrate by demonstrative evidence the value of the deposit by exploiting or mining the deposit. Castle v. Womble calls for justification for further expenditure of time and money to develop a mine. It does not call for exploitation - mining to extract ore from a mine in the operating stage.

B. The demonstrative evidence test presents a conflict with the decisions of the Supreme Court upholding the "prudent man rule." The "prudent man rule", pronounced by the Land Office in Castle v. Womble, 19 L.D. 455 (1894) and reaffirmed in Jefferson-Montana Copper Mines Co., 41 L. D. 302 (1912) was upheld in Chrisman v. Miller. 197 U.S. 313 (1905); Cameron v. United States, 352 U.S. 450 (1920); Cole v. Ralph, 252 U.S. 286 (1920); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); U. S. v. Coleman. 390 U.S. 599 (1968).

The requirement that the mining claimant must provide demonstrative evidence by exploitation of the deposit, created here by the Department and adopted by the Circuit Court, is a reversal of the "prudent man doctrine" irreconcileable with the long line of pronouncements by this Court applying the "prudent man rule". Castle v. Womble states:

> "After a careful consideration of the subject, it is my opinion that where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further ex-

> penditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby 'all valuable mineral deposits in lands belonging to the United States...are...declared to be free and open to exploration and purchase.' For, if as soon as minerals are shown to exist, and at any time during exploration, before the returns become remunerative, the lands are subject to other disposition, few would be found willing to risk time and capital in the attempt to bring to light and make available the mineral wealth, which lies concealed in the bowels of the earth, as Congress obviously must have intended the explorers should have proper opportunity to do. 19 L.D. 455.

C. The demonstrative evidence test presents a conflict with the decisions of the Supreme Court upholding the "prudent man rule". It is a departure by agency action from established practice which requires correction by the courts on judicial review.

It would be appropriate for the Court to take judicial knowledge of the economics of gold. The current price fluctuates around $150 per Troy ounce. Gold is a commodity universally accepted as a measure of the value of all other commodities. There is no certainty that we can phase gold out of the monetary picture. Once before, after the War Between the States, this Government was on an unredeemable paper money standard. Gold produced from many small mines in the West enabled us to make our currency the strongest in the world. During World War I, men were taken from shipyards to mine gold to fight inflation. Unredeemable domestic paper money has value by force of law, backed by governmental power over the citizens,

but internationally this does not follow. The importance of gold and other metals to our economy and to our national defense has been recognized by Congress in the Mining and Minerals Policy Act of 1970, 84 Stat. 1876:

> "Sec. 2 The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs,..."

D. Unpatented mining claims are constitutionally protected property in the highest sense of the term. Wilbur v. United States ex rel. Krushmic, 320 U.S. 306 (1930). Agency action which establishes a demonstrative evidence by exploitation test destroys title to many valid unpatented mining claims.

## CONCLUSION

Mr. Justice Douglas, speaking for the Court, said:

> "Unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty." New York v. U.S., ICC et al., 342 U.S.882.

It is understandable that agencies which have no responsibility for our national mineral reserves appear to frustrate Congressional mineral policy. See Government Initiated Contests Against Mining Claims--A Continuing Conflict, Utah Law Review, Vol 1968 No. 1, p. 114.

Agency rationalization of its own conclusions of ultimate fact which contradict the specific facts which should have been found from the evidence, has been the subject of recent discussion by Congress. Congressional Record, Proceedings and Debates of the 93rd Congress, Second Session Vol. 120 No. 18, February 19, 1974 S1911-1912 reprinted in the Appendix A 48, 49.

The agency contest and order declaring the petitioner's mining claims null and void should be set aside. His title has been destroyed. The ground may not be withdrawn from mineral entry immediately, but the Government may do so at any moment. So long as the ground is open, the petitioner can have no better title than any adverse claimant who may locate the ground.

We pray that the petition for writ of certiorari be allowed, that hearing be had, and that the decision below be reversed and the case remanded.

August 27, 1974.

Respectfully submitted,

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THE DECISION OF THE HEARING EXAMINER
BUREAU OF LAND MANAGEMENT
OF OCTOBER 26, 1961

CONTEST NO. 05987 (OREGON) Elephant No. 2 and Elephant Mountain No. 1 Lode Mining Claims.

Mining Claims Declared Null and Void

On January 14, 1960, the Government initiated a contest proceeding to secure the cancellation of the above identified mining claims by the filing of a complaint in the Land Office at Portland, Oregon. The material allegations in the complaint were that a valid discovery had not been demonstrated within the boundaries of the claims and that the land within the claims was nonmineral in character. The contestees filed a timely answer in which these allegations were denied.

Thereafter, a hearing was held in Portland, Oregon on May 9, 1961 to allow the parties an opportunity of presenting evidence and of examining and cross-examining witnesses. At the hearing, the contestant was represented by E. Kendall Clarke, Esq. Office of the General Counsel, United States Department of Agriculture, Portland, Oregon. Kenneth O. Watkins and Harold E. L. Barton appeared in their own behalf.

Background Statement

The claims were located for gold, silver, copper, lead and zinc and are within the Bohemia Mining District, Lane County, Oregon. The present value of the timber on the two claims was estimated by the Government to be approximately $23,550.

The parties were in substantial agreement regarding the general geology, occurrence of minerals and the historical background of the mining dis-

trict. Minerals were first found in the area prior to 1900 and since that time between one and two million dollars of gold and silver have been removed. Some of the mines in the vicinity of the Elephant claims are the Musick, Vesuvius, Sweepstake and Utopian (as shown on Exh. A). Other claims in the district which have produced in the past are the Champion, Helena and NoonDay. Claims on the North, East, South and West of the Elephant claims have either been patented or been clear listed for patent.

The substrata of the claims and the district is basically rhyolite with intrusions of dioritic dikes. Although mineralization has been found in fractures within the rhyolite, the contact between the diorite and rhyolite has proven to be the most favorable structural feature for the deposition of minerals. Although the veins or vein structures are continuous over considerable distances, the valuable deposits are found intermittently along the veins as ore chutes wherever there has been a concentration of minerals and occurrences of residual or supergene enrichment.

The witnesses who testified at the hearing on behalf of the Government were Milvoy M. Suchy and Lloyd E. Holmgren, both mining engineers employed by the Forest Service. The witnesses who testified on behalf of the contestees were Ray E. Nelson, who has an interest in mining claims located near the Elephant claims and who has been interested in the district for more than 20 years, George S. Barton, a miner and former owner of the claims, Kenneth O. Watkins, a miner, and Harold E. L. Barton, a geologist. Mr. Watkins and Mr. Harold E. L. Barton are the contestees.

After the hearing, the parties submitted extensive briefs to aid in the determination of the issues. In the briefs, the testimony of the various witnesses was set forth in considerable detail. Much of the factual testi-

mony given by the Government mining engineers was negative in nature and although substantially different in part from the factual testimony of the contestees' witnesses, it was not necessarily inconsistent with the latter testimony.

Summary of Testimony

The Government engineers were on the two claims with the contestees and examined the available improvements. On Claim No. 1, a vein in an oxidized zone is exposed in two adits near the east end line, in an outcropping 200 feet to the west and in an adit 100 feet further west. Six samples were taken across this vein by the Government witnesses and assayed for gold, silver, lead, copper and zinc. The indicated assay values ranged from $1.25 to $7.19 per ton (Exh. 2). The latter sample was taken at the face of the adit below Utopian Road across 10 inches of vein material. Three other samples taken along the vein and within 30 feet assayed $1.24, $2.97 and $1.64.

The major improvement on the No. 2 claim is an adit along the lode line in the east half of the claim. This adit exposes a vein structure, the mineralized portion of which varies in width from 16 inches to 24 inches. Mr. Suchy stated that the vein material is quartz which is the cementing material of the fault breccia within the fractural zone. The material appears vuggy and base metals or pyrite could have been leached from it. In describing the vein, Mr. Suchy stated that it was both strong and competent.

Six samples were taken over a distance of approximately 40 feet in the ceiling of the adit at points in which the contestees reported that an ore chute had been encountered. Additional samples were taken fromthe same vein south of the adit and from a dozen cuts at a higher elevation, north of the adit. These samples assayed from $1.60 to $9.65 per ton. (Exh. 3).

The Government witnesses determined the strike and dip of the veins on the two Elephant claims as well as the known veins on the adjoining claims. From the limited exposures, they were unable to project the veins on the adjoining claims into the two claims in issue. They concluded from their examination of the claims that further exploration would be justified.

Ray E. Nelson, in testifying as a contestee witness, stated that the Bohemia Mining District has been his hobby for many years and that he has an interest in the Sweepstakes claims which are approximately 150 feet west of the Elephant No. 2 claim. He has read most of the published literature on the district and has talked to many of the old timers in the area. He said that there are three veins on the Sweepstakes claims, that he has traced the central vein down through the No. 2 claim and that the southern vein on the Sweepstakes has a trend which is generally in the direction of the No. 1 claim. He discussed the other veins in the area generally and stated that the Lizzie Bullock claim, with production record of $200, embraced a portion of claim No. 2.

George S. Barton first became interested in the Elephant claims in 1935 and at at later date acquired them. The title of the contestees devolved through Mr. Barton. Mr. Barton and his associates constructed the main adit on claim No. 2. He stated that a short distance inside the adit he secured an $84 gold sample across a 4 foot vein in 1937. After a distance of 40 or 50 feet, the values were less. He traced the vein westerly across Claim No. 2 and on into the Sweepstakes claims. He stated that the ore in the vein was spotty but that this is characteristic of the district. Mr. Barton is familiar with other veins in the district and compared the vein on Claim No. 2 to some of the veins which contained ore chutes of great value. He

specifically referred to the vein on the Helena claim. On this claim the vein contained ore of little value at the discovery cut but 50 feet away a valuable deposit was found. Mr. Barton expressed confidence in the two claims and stated that the claims would warrant further exploration.

Kenneth O. Watkins, one of the contestees, testified that he has been familiar with the Bohemia Mining for many years, that the two major veins on the claims in issue are similar to the other veins in the district, that both veins extend the length of the claims, and that although the vein on Claim No. 2 is wider, he knows of no reason why the vein on Claim No. 1 would not have ore chutes either at depth or along its length similar to other veins in the district. He stated that there has been substantial leaching in the veins, particularly on Claim No. 1, and that some of the remaining minerals are chalcopyrite and sphalerite. He expressed the opinion that because of the leaching, the mineral values increase at depth.

Outside of the adit on Claim No. 2, there is an ore dump containing between 24 and 30 tons of material. After finding fragments of galena, Mr. Watkins sampled the dump by chipping off small pieces "all the way around it and across the top"(Tr. 117) until he had about a 20 lb. sample. This sample assayed $71.33 per ton in gold and silver (Exh. D). Because of this value, he sampled the vein in the adit on the floor, rather than on the ceiling, at three locations shortly before the hearing. A fourth sample was taken on the ceiling. These samples were across a width of from 17" to 19" and assayed from $8.91 to $72.61 per ton on gold and silver. Mr. Watkins concluded that a prudent person would be justified in spending further time and money on the claims.

Also, Mr. Watkins stated that the mineralization in the veins is not uniform, it is erratic,and that while his samples taken on the floor of the adit had much greater values than the samples taken by Mr. Suchy on the ceiling 6 feet away, the values could have been reversed. It depends on whether the sample is taken in an ore chute or just outside of it. He said it is common for the veins to change that quick. Mr. Watkins intends to drive under the adit in the hope of finding a small rich ore body.

Mr. Harold E. L. Barton, a geologist and a contestee, testified that he had been familiar with the District since 1935 and had traced the two main veins on the claims through outcropping, cuts, and other exposures to the adjoining claims on the east and on the west. On Claim No. 1 there is a smaller vein north of the main vein and this smaller vein trends toward the main vein, and although there is no surface evidence, it very likely intersects the main vein near the center of the claim. The vein would then continue westerly roughly parallel to the vein on Claim No. 2. He said that this is an extension which had not been proven from surface observations but that the veins in the District were often continuous for two or three claims. He has traced the main vein of Claim No. 1 easterly from the adit to a point east of the end line and at that point the vein trends in the direction of the Crystal Vein on the El Calado claim.

Mr. Barton described the vein on Claim NO. 1 as having pockets and bunches of sulphides and stated that leaching took place within the brecciated and quartz-cemented vein matter. The samples which Mr. Barton took along this vein were similar to the samples secured by Mr. Suchy.

He stated that the District is a recognized producing area, that it is one of the principal mineralized areas of the Western Cascades in terms of

gold, silver, copper, lead and zinc, that there have been profitable operations in the past and that qualified authorities believe the ore reserve in the District will assure profitable operations in the future. Mr. Barton concluded that the veins on the two claims are persistent veins containing mineralization characteristic of the District and warrant further exploration with a reasonable expectation of developing a profitable operation.

Additional evidence was presented by Mr. Barton in the form of excerpts from various published documents (Exh. G. H. and I.). These excerpts corroborate much of the background testimony given by the witnesses.

CONCLUSIONS OF FACT

From the evidence presented at the hearing, only a small portion of which has been summarized herein, I find that the Bohemia Mining District is one of the principal mineralized areas on the west slope of the Cascade Range, that the veins in the District are spotty with ore chutes of considerable value, that the veins are often coninuous for the length of several claims, and that in this distance the veins can be erratic and can change their strike and dip. The two claims in issue are within this mineralized zone on land which is mineral in character and contain veins with similar characteristics to the veins in the District along which ore chutes of value have been found.

Also, I find that the contestees' witnesses have had more time on the claims and a greater opportunity to observe the veins than the Government witnesses and that their testimony to the effect that the veins on the two Elephant claims are extensions of other veins on claims to the east and west, is more persuasive than the testimony on the same subject offered by

the Government witnesses. An ore chute containing sufficient quantity of valuable ore to be mined profitably, has not yet been identified on either claim, but I agree with the witnesses that further exploration along the veins is warranted in an attempt to locate such an ore chute.

The real question which developed at the hearing was whether there had been a discovery of a valuable mineral deposit on the claims even though these conclusions can be assumed.

Conclusions of Law

The mining laws provide that public land valuable for minerals shall be reserved from sale except in conformance with the mining laws, that all valuable mineral deposits in vacant public lands belonging to the United States shall be open to exploration and purchase, but that no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim (30 U.S.C. Sec. 21 et seq.). In the determination of whether there has been a discovery of a valuable deposit, the Department has followed the rule announced in Castle v. Womble, 19 LD. 455 (1894) wherein it was stated:

> "*** where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met."

The contestees contended in effect that the willingness of a prudent man to continue exploring along a vein containing gold, silver, and other minerals in a district in which exploration along similar veins often resulted in the finding of valuable ore chutes satisfied the requirements of the mining laws. There is no question that a vein containing some gold

and silver has been found on both of the claims and that the exploration of some of the veins in the district has resulted in the finding of ore chutes with a sufficient concentration of minerals to be profitably mined. This suggests that a prudent person would be justified in continuing the exploration of the claims in an attempt to locate an ore chute. But the contestees have not yet found such an ore chute. There is no way of determining from the evidence whether an ore chute can be found on one of the claims, on both of the claims, or on neither of the claims.

The prudent man rule is not an alternative to the substantive provision of the mining laws requiring the discovery of a valuable mineral deposit. The rule is applicable only in the determination of whether a particular deposit is valuable. In this case, the further expenditure of labor and means would not be directed toward the development of a deposit which has been found but would be directed toward the finding of a deposit which the evidence indicates might be found and could be developed. Since a particular mineral deposit has not been found which would induce a prudent person to expend further labor and means in its development, I must conclude that there has not been a discovery of a valuable mineral deposit on either of the claims in issue.

Final Conclusion

The Elephant Mountain No. 1 and the Elephant No. 2 mining claims are declared null and void for the lack of a discovery of a valuable mineral deposit.

Right of Appeal

This decision becomes final 30 days from its receipt unless an appeal to the Director, Bureau of Land Management, is filed. If an appeal is taken, there must be strict compliance with the regulations in 43 CFR,

Part 221. (See enclosed Form 4-1364). The amount of the filing fee will be $5.00 for <u>each</u> mining claim, or $10.00 for the two claims adversely affected. The adverse party to be served with a copy of the appeal is: Office of the General Counsel, United States Department of Agriculture, 320 S. W. Stark Street, Portland 4, Oregon.

/s/ Graydon E. Holt

Graydon E. Holt
Hearing Examiner

THE DECISION OF THE ASSISTANT DIRECTOR
BUREAU OF LAND MANAGEMENT
OF NOVEMBER 2, 1962
REVERSING THE HEARING EXAMINER

The above named contestees have appealed from a decision of the Hearing Examiner, dated October 26, 1961, declaring the Elephant Mountain No. 1 and Elephant No. 2 Lode Mining Claims null and void for the lack of a discovery of a valuable mineral deposit.

The complaint charged that a valid discovery had not been demonstrated within the boundaries of the claims and that the land within the claims is nonmineral in character.

The claims, located in 1940, are situated in the Umpqua National Forest in the Bohemia Mining District, Lane County, Oregon.

The appellants contend that (1) to void the claims would deprive them of property rights in lands which are mineral in nature and in which they have a substantial investment, (2) it was error to admit evidence relating to the value of the timber on the claims, and (3) a discovery of valuable minerals in the claims has been demonstrated and the examiner's decision seems to require the present disclosure of ore that can be mined profitably.

A mining claimant acquires no rights as against the United States until he makes a discovery. Until that time, he is a mere licensee or tenant at will. Upon discovery he acquires as against the United States and all the world an exclusive right of possession to the claim which is property in its fullest sense of the word. United States v. Carlisle, 67 I.D. 417 (1960). Where it is thought that a valid discovery has not been made on a mining claim, the established procedure of the Department

has been to institute adverse proceedings against the claim and to hold a hearing for the purpose of receiving evidence on this issue. The Dredge Corporation, 65 I.D. 336 (1958).

The appellants' possessary right might have continued in the absence of any request for patent, but when they applied for a patent, they voluntarily assumed the burden of demonstrating that a valid discovery exists on each of the claims. United States v. Eric North, A-27936 (July 1, 1959). A hearing on the validity of a mining claim is a hearing on a claim to property. United States v. O'Leary et al., 63 I.D. 341 (1956). Where in a contest against a mining claim it is found that a valid discovery has not been made, the consequence is that the claim is invalid or null and void. United States v. Carlisle, supra. Further, substantial expenditures on a mining claim alone cannot serve to validate it.

With regard to the admission of testimony as to timber values on the mining claims, while the existence of valuable timber on a mining claim, though in a national forest, does not qualify a mining claimant's rights if he has a valid claim, it is a proper element for consideration in determining the weight and creditability to be given to the claimants' testimony. Helen V. Wells, et al., 54 I.D. 306 (1933). The Department has long required that the evidence sustaining the validity of mining claim in a national forest must be clear and unequivocal. United States v. Langmade and Mistler, 52 I.D. 700 (1929); United States v. Dawson, 58 I.D. 670 (1944); United States v. Duvall and Russell, 65 I.D. 458 (1958). Also compare United States v. Woodard, A-28051 (October 3, 1960).

The discovery of a vein or lode bearing valuable mineral deposits is a prerequisite to the issuance of a patent for any lode mining claim (30 U.S.C. secs. 22 and 23). "To constitute a valid discovery upon a claim for which patent is sought, there must be actually and physically exposed within the limits thereof a vein or lode of mineral-bearing rock in place, possessing in and of itself a present or prospective value for mining purposes . . ." East Tintic Consolidated Mining Claim, 40 L.D. 271 (1911). It is not until minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine, that the requirements of the law have been met. Castle v. Womble, 19 L.D. 455 (1894).

The department in Jefferson - Montana Copper Mines Co., 41 L.D. 320 (1912), outlined the requirements necessary to establish a valid discovery on a lode mining claim as follows: (1) There must be a vein or lode of quartz or other rock in place; (2) The quartz or other rock in place must carry gold or some other valuable mineral deposit; and (3) the two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in an effort to develop a valuable mine.

The Hearing Examiner by his statement that "An ore chute containing sufficient quantity of valuable ore to be mined profitably, has not yet been identified on either claim. . ." apparently required the existence of a sufficient quantity of valuable ore that can be presently

profitably mined. This is not our understanding of the prudent man rule. An actual discovery of profitable ore is not essential to a sufficient and adequate discovery under the prudent man test. A valuable mine need not be a profitable mine, but the evidence of value which sustains a discovery must be such that with actual mining operations under propertmanagement, a profitable venture may reasonably be expected to result. United States v. Santiam Copper Mines, Inc., A-28272 (June 27, 1960); United States v. Fullinghim and Tinkle, A-28850 (September 18, 1962). Thus, as stated above, a valid discovery is made where there is discovered a mineral bearing vein possessing in and of itself a present or prospective value for mining purposes.

Veins of mineral bearing rock have been shown to exist on both of the claims; accordingly, the primary question is the sufficiency of the mineral discovery. Assays of samples have only limited value as evidence without knowledge of the extent or strength of the veins or structures exposed on the claims. See United States v. Northern Pacific Railway Company, 1 F.2d 53, 57 (1954).

An analysis of the testimony relating to the Elephant Mountain No. 1 and Elephant No. 2 claims discloses the following: On the Elephant Mountain No. 1 claim is a vein 10 to 26 inches in width in an oxidized zone exposed in two adits near the east end line, in a cut 300 feet to the west and in an adit 100 feet further west, (Tr. 16-22). Improvement No. 3 (Exh. 1 and 2), a cut and adit east of Utopian Road, displays a badly oxidized fractured zone containing some quartz bands, nodules of quartz considerable staining by iron oxide, a little

galena, chalcopyrite and sphalerite. Mr. Milvoy M. Suchy, a Forest Service mineral examiner, took a sample outside the portal at the edge of the road across 26 inches of oxidized vein material, which assayed at $2.97 a ton. At the portal another sample was taken with an indicated value of $1.24 per ton. Mr. Suchy testified that because of the badly oxidized condition near the surface and what sulphides were present have all leached away, it is hard to say how much of them were iron pyrite and how much were base metal. (Tr. 16-17, 44.)

A sample was taken below Utopian Road by Mr. Suchy in what was then the face of a cut driven on the same structure that was exposed in Improvement No.3. It was badly oxidized, appearing to be a shear zone, and the rock wall was breccia on the north side and rhyolite on the south side. The sample across a 13-inch width yielded an indicated value of $1.64 a ton (Tr. 18.) Later he found the cut had advanced 12 feet and went underground 15 feet and displayed some pyrite, which it had not previously, and some base metals. His sample from the adit, cut across 10 inches of oxidized material in a country rock of rhyolite, containing disseminated pyrite and base metal sulphides assayed at $7.19 a ton. (Tr. 19-20.)

Mr. Suchy then testified that the cut, 300 feet to the west of the working referred to above, displays a rhyolite tuff which carries a band of sulphide about an inch wide and a few spots of sulphides scattered through the area. He found that the rholite is silicified, the silicified zone carrying pyrites and base metal sulphides is about 10 to 16 inches wide, and that the two samples, one 16 inches and the

other 10 inches wide, which he took, assayed at $2.70 and $1.93 a ton, respectively.

This witness further stated that the projection of this same vein was followed into Improvement No. 4, which is 100 feet to the west of the above-mentioned cut, where it is exposed just outside the portal of the tunnel, within the cut, where it appears to have broken into several narrow quartz bands from 1 to 1-1/2 inches wide. (Tr. 21-22.)

In regard to the structure or vein, which is the basis of location of this claim, he stated that it is exposed almost entirely within the oxidized zone, that it has not widened appreciably between Improvement No. 3 and the exposure 100 feet east of Improvement No. 4, and that, at the latter working, it has broken into narrow bands (Tr. 21-22.)

It was Mr. Suchy's opinion as to Elephant No. 1 claim, that the structure did not impress him because a strong well defined mineralized vein had not been exposed, and that in view of the limited width, it is not favorable for development of a paying mine (Tr. 22, 31-32.)

Mr. Kenneth O. Watkins, one of the contestees, testified that the vein on Elephant Mountain No. 1 claim is pretty definite for a long distance, almost the entire length of the claim, that the vein is tighter and the mineralized part is not as wide as the vein on Elephant No. 2 claim, but both are basically the same type of vein. (Tr. 113.) He stated that where there has been leaching the residue

was largely chalcopyrite, a copper mineral, with some sphalerite; that in the places worked the last two years, the short tunnel towards the west end below the road and in some surface cuts toward the west end, some sulphides were found in each place and some evidence of leaching. (Tr. 115-116.) He believed that a prudent man would be justified in spending time and money on this claim with the expectation of developing a paying mine. (Tr. 123.)

Mr. Harold E. L. Barton, a geologist and a contestee, testified that basically the mineralization indicated by Mr. Suchy's sampling on the Elephant Mountain No. 1 claim was representative and the presence of heavy lead, zinc, and copper sulphides indicates leaching at that point (Tr. 144-145.) He believes that the contestant is in error in stating a discovery does not exist. On cross examination, he stated that future work on the eastern end of the claim should be to tunnel under the area of principal mineralization. (Tr. 151-152.)

As to the Elephant No. 2 claim, the major improvement or working is an adit near the east end of the claim which exposes a vein 11 to 24 inches in width. The vein material is quartz which is the cementing material for the fault breccia within the fractured zone. It is quite vuggy and base metals or pyrite have been leached from it. (Tr. 23-24.) Mr. Suchy, Government Mineral Examiner, testified that sampling was confined to a particular zone in the tunnel as the claimants stated it was the point where an oreshoot at one time had been encountered; that a structure, quite strong and quite

competent, was encountered 50 feet from the portal. Then it was followed for 40 feet to where it leaves the adit by going into the left rib. (Tr. 24-251.) Another vein was slightly exposed at the breast of the adit, which approximately parallels the other vein. The fracturing is along side of what appears to be a dark dike coming in on the right rib, (Tr. 25; Exh. 3.)

Mr. Suchy took 7 samples on the more exposed vein in the adit where they had the widest and most competent structure. The samples varying in width from 11 to 24 inches, assayed from $3.07 to $9.65 a ton in gold and silver. (Tr. 25-26, 32; Exh. 3, 5, and 6.) A dozer cut, above the adit to the east, on the same vein was sampled across 20 inches by Lloyd E. Holmgren, a mineral examiner for the Forest Service. (Tr. 60-61.) The vein structure outside the working, above the portal to the south was sampled across 15 inches, by Mr. Suchy. These assayed at an indicated value of $1.95 and $1.60 a ton, respectively, in gold and silver (Tr. 26, and 60-61, Exh. 3, and 6.)

Mr. Suchy, when asked for his opinion on the probability of developing a paying mine on this claim, answered that he was skeptical of the structure and values present and believes that the values were due to supergene enrichment, which he stated does not represent the values originally placed in the vein. He further stated that he did not know the extent of the enrichment; the working is so close to the surface, 10 to 15 feet, he had no way of evaluating the showings of gold except to believe, because of the oxidized zone and the appearance of the vein, it represents enrichment within the vein structure. Mr. Suchy

also was of the opinion that to be comparable to the gold values which accounted for the large amount of the production in the mining district, one would have to have an extensive zone of this supergene enrichment with assays of $50 a ton and upward. (Tr. 29, 30.)

Mr. Kenneth O. Watkins, a contestee, testified that the major vein on No. 2, like the major vein on Elephant No. 1, is similar to the common run of veins in the mining district. As far as Elephant No. 2 claim is concerned, it is almost completely oxidized and is a strong structure. In the main tunnel there is substantial leaching. (Tr. 115.) Because of an extremely high assay of a selected sample from the dump at the portal of the adit, he further sampled the tunnel a few days before the hearing. Three samples from the floor of the adit cut across 17, 18 and 19 inches assayed at $8.91, $10.30 and $72.61 per ton, respectively. A fourth sample from the roof toward the breast of the adit cut across 10 inches had an indicated value of $24.84 a ton. (Tr. 118-119; Exh. 3, E and D.) Mr. Watkins concluded that a prudent man would be justified in spending further time and money on the claim with the expectation of developing a paying mine (Tr.123.); and stated that he would drive a tunnel underneath the oreshoot. (Tr. 127.)

Mr. Harold E. Barton, geologist and a contestee, testified that he believes a discovery had been made on the Elephant No. 2 under the prudent man test and stated that now the logical thing to do is bring another crosscut tunnel under the area of principal mineralization, at the portal of the adit, which he refers to as an oreshoot. (Tr. 151-152.)

Mr. Suchy, on rebuttal stated, as to the high value of the

samples obtained by Mr. Watkins in the adit on Elephant No. 2, that if there was continuity of the values over a reasonably length he would conclude that there was a valuable deposit. He also replied that 40 feet would be a reasonable length. When asked whether the Elephant No. 2 meets the prudent man test, he stated that high values in oxidized zones and other places may or may not lead to a valuable deposit, neither does it mean you have an oreshoot and the extent of the enrichment is unknown until you do exploratory work. (Tr. 160, 163, 164.) He would recommend sinking at the point of mineralization. (Tr. 173.)

After careful consideration of all the foregoing testimony concerning the strength of the structures or veins on the claims and the assays of samples taken from the exposure as well as the characteristics of veins in the mining district, we are persuaded that the record supports a conclusion that a prudent man would be warranted in expending his time and money in sinking on, or tunneling into the veins on these claims with a reasonable prospect of developing a paying mine.

Accordingly, the Hearing Examiner's decision declaring the Elephant Mountain No. 1 and Elephant No. 2 lode mining claims null and void is reversed.

The United States, through the Department of Agriculture, is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221 as amended. See enclosed form 4-1365. In taking an appeal there must be strict compliance with the regulations.

/s/ L. Hoffman
Assistant Director

THE DECISION OF THE ASSISTANT
SOLICITOR, LAND APPEALS
UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington, D. C. 20240

A-30659 October 19, 1967 Oregon Contest No. 05987

United States
v.
Kenneth O. Watkins and
Harold E. L. Barton

Mining claims declared
null and void
Affirmed

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Harold E. L. Barton 1/ has appealed to the Secretary of the Interior from a decision dated May 2, 1966, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of a hearing examiner declaring null and void the Elephant Mountain No. 1 and Elephant No. 2 lode mining claims in secs. 2,3,10 and 11, T. 23 S., R. 1 E., W. Mer., Oregon. The claims are situated in the Umpqua National Forest in the Bohemia Mining District, Lane County, Oregon, and were located on July 1, 1940, by George Barton, Albert Andersonand N. M. Anderson.

On January 20, 1958, mining claimants Watkins and Barton applied for patent to the Elephant Mountain group of lode mining claims, consisting of the Elephant Mountain No. 1, Elephant No. 2, Elephant No. 4, and Grubstake lode claims. The claims were alleged to contain gold, silver, lead, zinc and copper. On January 14, 1960, the Bureau of Land Management, upon the recommendation of the United States Forest Service, filed a contest complaint alleging therein that a valid discovery had not been demonstrated within the

1/ Kenneth O. Watkins, an original party to this proceeding, died during the period in which the matter has been before the Department, and the current appeal is prosecuted by Barton.

boundaries of the claims and that the land is nonmineral in character. Following a hearing at Portland, Oregon, on May 9, 1961, the hearing examiner determined that the claims are within the mineralized zone of land which is mineral in character and contain veins with similar characteristics to the veins in the district along which ore shoots of value have been found but that the claimants had not made a valid discovery on either of the claims, and he declared both claims null and void. On appeal to the Director of the Bureau of Land Management, the Assistant Director found, in a decision dated November 2, 1962, that a discovery had been made and, accordingly, held the claims to be valid. By a decision dated April 24, 1964, (United States v. Kenneth O. Watkins and Harold E. L. Barton, A-29862, the Department set aside the Bureau's decision and remanded the case for further hearing.

At the initial hearing, witnesses for the Government introduced in evidence the assay results of six ore samples from Elephant Mountain No. 1 claim and nine samples from Elephant No. 2. The indicated assay values ranged from $1.24 to $7.19 per ton on claim No. 1 and from $1.60 to $9.65 per ton on claim No. 2. Witnesses for the mining claimants introduced the results of seven ore samples with indicated values ranging from $2.91 to $72.61 per ton.

The ordering of a new hearing was predicated upon the fact that both parties to the contest, subsequent to the original hearing, submitted additional evidence bearing upon the question of the validity of the claims. The mining claimants submitted an assay report of a sample of ore taken after the hearing from the Elephant Mountain No. 1 claim which showed a value of $9.95 at a point where, purportedly, a Forest Service sample had shown a value of $2.70. The claimants also submitted an affidavit of

William E. Caldwell, Professor in Chemical Engineering, Oregon State College, and a graduate of the Montana School of Mines, giving his evaluation of the contested claims. The Forest Service submitted an affidavit of Lloyd E. Holmgren, one of the mining engineers who testified at the hearing, in which he described a re-examination of the Elephant No. 2 claim made after the Bureau's decision of November 2, 1962. Holmgren stated that he took samples from the floor of the adit in the area in which one of the contestees' witnesses had obtained a sample with an indicated value of $72.61 per ton. Holmgren's samples, cut from veins from 17" to 18" wide, were valued at from $10.05 to $16.51 per ton.

Subsequent to the Department's decision of April 24, 1964, the mining claims were re-examined by Milvoy M. Suchy, a mining engineer employed by the Forest Service who also testified at the initial hearing, in the company of appellant Barton and others. The findings of this re-examination, together with other evidentiary matter obtained by the parties to the contest, were presented by witnesses for the respective parties at a hearing held at Eugene, Oregon, on July 21, 1964.

The testimony given at the second hearing has been summarized in the decisions of the hearing examiner and of the Office of Appeals and Hearings, and it is unnecessary here to repeat in detail that which has already been reported in those decisions. Stated summarily, the pertinent factual evidence presented at the second hearing consisted chiefly of assay reports of additional ore samples taken by both parties from the claims. The Forest Service submitted in addition to the findings attested to by witness Holmgren subsequent to the initial hearing, the assay results of six ore samples taken from the Elephant No. 2 claim shortly before the second hearing, five

of which showed values ranging from $.35 to $1.05 per ton and the sixth of which, a grab sample taken from material which had been sacked, had an indicated value of $28.50 per ton. Appellants submitted the results of four additional samples taken in 1964, showing values between $6.52 and $11.21 per ton, and the assay report of a sample taken in 1937, and testified to at the first hearing by George Barton, which indicated a value of $84.46 per ton. Testimony was also given as to the nature, course, and probable extent of the mineral veins found on the claims, the history of mining activity in the district and the prospects for further development, and the similarities and dissimilarities between the claims in question and other claims in the district upon which producing mines have existed. The second hearing also resulted in a revision in the evaluation of timber on the contested lands downward from $23,550 to $13,114, re-examination having disclosed that parts of the claims were on revested Oregon and California Railroad grant lands which should not have been included in computation of the timber values on national forest land.

After summarizing the evidence and the applicable principles of law, the hearing examiner concluded that:

> "*** Minerals have been found in the oxidized portion of veins and the values of the minerals are sufficient to to induce further exploration. But the minerals found have no present or prospective value for mining purposes. Mr. George Banton [sic] secured an $84.46 gold sample in 1937 and a few feet away the values disappeared. Mr. Watkins secured a $72.61 gold sample in 1962 and again this value was substantially reduced a few inches away according to the Holmgren samples. What the contestees are looking for on the claims is either pockets of precious metals in the oxidized zone of the vein or shoots of base metals below the oxidized zone with sufficient quality and quantity of minerals to have some potential value. This is the very thing that has not been found.

* * *

"For the Elephant claims in issue an accessible mill less than two miles away would be an additional inducement to explore both along the veins for secondary gold deposits and at depth below the oxidized zone for base metals. But at this time there is insufficient evidence to support a finding that a particular deposit has been found which would induce development by a prudent person with a reasonable prospect of success."

The conclusions thus arrived at were virtually the same as those which the hearing examiner reached after the first hearing. The Office of Appeals and Hearings, upon reconsideration of the evidence, concurred with the hearing examiner in his finding that a discovery had not been shown and stated that:

"*** The testimony is conclusive that further exploration of the claims is indicated, but that is not sufficient to constitute a discovery. Even if there was a showing that veins in nearby claims with the same geologic structure as those here had produced in the past, it would not be sufficient to constitute a discovery. There is no showing that the values exposed and the quantity thereof on these claims, on the basis of all the testimony now in the record, are sufficient to constitute a discovery under the prudent man standard."

Appellants contend in the present appeal to the Secretary that none of the evidence submitted at the second hearing by the contestant has in any way weakened the fact of discovery which was recognized by the Director in his first decision. They base their contention on the assertions that

(1)All of the new samples introduced by the Government except one were of the surficial outcrop zone on a vein in which supergenous solution was believed to have occured and therefore in a zone where characteristically little or no values would remain at the surface;

(2) The one sample in the upper adit on Elephant No. 2 was not cut on the principal mineralized band but, rather, in relatively waste material on the footwall side of the vein which at this point had entered the right rib of the tunnel;

(3) The dump sampling taken showed mill-grade ore;

(4) Testimony at the hearing shows that Government witness Holmgren erred in his point of reference in attempting to verify the high-value sample of $72.61 reported by appellant Watkins at the first hearing;

(5) Where Holmgren's samples coincided with those taken by Watkins and Barton, the results were comparable, i.e., Holmgren's $10.05 sample coincided with Watkins' $10.35 sample, his $10.95 sample with Watkins' $8.91 sample, his $14.93 sample with Barton's $11.21 sample, and his $16.51 sample with Barton's $8.80 sample;

(6) The demonstrated values of the samples, considered with the respective points from which they were taken, clearly support appellants' testimony concerning the certainty of generally increasing values with depth.

Since, appellants contend, the evidence produced at the second hearing did not weaken that produced at the first hearing but reinforced it, there is no basis for reversing the Director's first decision finding a discovery. The appellants, however, assert that the Director erred in his construction of the law in his second decision.

The critical issue here, in our view, is not so much what the facts are but, rather, the significance of the established facts as they relate to the ultimate question of discovery. There appears to be basically a lack of a common understanding as to what constitutes a discovery of a valuable deposit of minerals. Indicative of this is the testimony of expert witnesses for the opposing parties with respect to the further steps which should be taken in attempting to determine the mining potential of the claim in question. The following is illustrative:

"Q [by Mr. Clarke, attorney for the Forest Service] What would you recommend to a miner claimant to be done on Elephant No. 2 now if you were in a position to make that type of recommendation?

A [by Government witness Suchy] Basically exploratory work. There were high grade pockets taken out in other claims from producers in the district, near-surface production

or at surface production. I don't think this has been investigated enough to know whether that is true here or not. There are values. If there are values, there should be enough interest, at least, to explore them and see if it's going to lead to any appreciable deposit. We have nothing to go by here really." Tr. 28, 2nd hearing.

Q [By Mr. Barton] From your hearing of the additional testimony introduced by the Forest Service today with regard to Elephant No. 1 and Elephant No. 2 claims, does this change in any way your evaluation of the worth of the deposit shown on Elephant No. 2 claim?

A [by contestees' witness Caldwell] I have always thought that Elephant No. 2 outcrop was similar to that of the Musick and Champion, and that it is a vein that should be prospected at depth for probably sulfide mineral value.

Q And is it your opinion that a prudent man would be justified in expending further time and effort with a reasonable prospect to develop a paying mine?

A Very definitely, and that is furthered by the fact that the Government has spent thousands of dollars in the last couple of years at depth on the nearby Musick mine, and that there is a company going up there this summer. They have already been up there on preliminary surveys in which they are to spend some seventy some thousand dollars in diamond drilling to ascertain values at depth. I see no possibility, in my mind, where any engineer could list the Elephant No. 2 as a nonmineral area." Tr. 50-51, 2nd hearing. 3/

The essence of appellants' basis for claiming a discovery was set forth by Professor Caldwell in his affidavit of June 14, 1961, previously referred to, in which he stated, speaking of the Elephant Mountain No. 1 and Elephant No. 2 claims, respectively, that"

"The vein is definite in strike and dip, but does not show economic mineral value in the shallow depth of its exposure. In keeping with geological inference to other outcrops in the Bohemia mining district, it is more than probable that greater quantity of the already proven valuable metal minerals can be found in depth and extension of this vein.

3/ The testimony of other witnesses is to a similar effect. See, e.g., testimony of George S. Barton (Tr. 98, 1st hearing) and of Harold E. L. Barton (Tr. 146, 1st hearing). Appellants' concept of a 'discovery" was clearly manifested by the former in the following exchange:

* * *

"The vein fillings of the Musick outcrop and Elephant No. 2 vein are of identical minerals, brown oxidized quartz, some brecciated and weathered country rock agglomerate, and small amounts of zinc, lead, iron and copper sulfides. Bug holes, partly filled by hydrated brown iron oxides, denote oxidation and dissolving from the rock of metal sulfide minerals that had been present. At depth in the sulfide zone of this Elephant No. 2 vein as with the Musick vein (and in general all major fissures of the Bohemia district) the percentage of metal minerals will be found considerably higher than in the upper or oxidized gosson zone.

* * *

"A typical Bohemia district vein has been exposed by considerable work extending over 700 feet in length (and a few hundred feet in elevational difference) on the Elephant No. 2 claim. This writer has no assay results for gold and silver content of the oxide stained quartz vein rock. He has been informed high, medium and low values are reported according to place. Even the famous Musick vein has been stoped for economic ore in only about 30% of its tunnel length at the recently viewed 700 foot level. Valuable metal minerals have been viewed in the Elephant No. 2 vein rock, and evidence of leaching of additional metal minerals from the rock

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Footnote 3 Continued:

"Q [By Mr. (Harold) Barton] Do you feel from your knowledge of that claim and the testimony that you have heard here today that a valid discovery exists on that claim of minerals?

A [by George S. Barton] Yes, in several places and--

MR. CLARKE: I object to the answer, Mr. Hearing Examiner, as calling for an ultimate conclusion.

HEARING EXAMINER HOLT: Well, I think that you should qualify your word 'discovery' or describe what it is that you mean by 'discovery'.

MR. BARTON: Well, I'm intending to use the term as defined in the law, that a mineral claim is deemed to have a discovery when sufficient evidence of mineralization is found to justify an ordinarily prudent man to continue exploration with the probability that he would develop a paying mine." Tr. 98, 1st hearing.

> near surface seen. If this claim were mine, I would certainly dig, or expend for digging, in or toward areas whence good assays of over two foot seams have been displayed."

The substance of the view which governed the treatment of this case by the Bureau was stated by the hearing examiner in his initial decision of October 26, 1961, in the following manner:

> "* * * There is no question that a vein containing some gold and silver has been found on both of the claims and that the exploration of some of the veins in the district has resulted in the finding of ore chutes with a sufficient concentration of minerals to be profitably mined. This suggests that a prudent person would be justified in continuing the exploration of the claims in an attempt to locate an ore chute. But the contestees have not yet found such an ore chute. There is no way of determining from the evidence whether an ore chute can be found on one of the claims, on both of the claims, or on neither of the claims.
>
> "The prudent man rule is not an alterntive to the substantive provision of the mining laws requiring the discovery of a valuable mineral deposit. The rule is applicable only in the determination of whether a particular deposit is valuable. In this case, the further expenditure of labor and means would not be directed toward the development of a deposit which has been found but would be directed toward the finding of a deposit which the evidence indicates might be found and could be developed.* * * "

In short, the view of the appellants is that the test of a discovery is satisfied if the evidence of mineralization on a mining claim is such that a prudent man would be justified in the expenditure of money and effort in exploring the mineral potential with a reasonable expectation that such exploration would lead to the development of a profitable mine. Under the concept employed by the Bureau, the test of what a prudent man would or would not be justified in doing cannot be applied until a mineral deposit has been found the development of which may be contemplated. The distinction is significant.

The test of a discovery of a valuable mineral deposit is quite sim[illegible] stated and has been frequently repeated since it was enunciated, first by [illegible] Department and subsequently by the courts.

> "/W/here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met." Castle v. Womble, 19 L.D. 455, 457 (1894); Chrisman v. Miller, 197 U.S. 313, 322 (1905); Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335 (1963).

Where the location is of minerals in a lode or vein,

> "1. There must be a vein or lode of quartz or other rock in place.
>
> 2. The quartz or other rock in place must carry gold or some other valuable mineral deposit.
>
> 3. The two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine."
> Jefferson-Montana Copper Mines Co., 41 L.D. 320, 323 (1912).

In a long line of decisions the Department has distinguished between "exploration" and "development" as they relate to "discovery" under the mining laws. The Department has held that the showing of mineralization which will justify further exploration may not be adequate to warrant development of a mining claim and that it is only when it can be said that a prudent man would be justified in expending his means in the developmen[t] of a mineral deposit that a discovery has been made. See United States v. Laura Duvall and Clifford F. Russell, 65 I.D. 458 (1958); United States [illegible] Clyde R. Altman and Charles M. Russell, 68 I.D. 235 (1961); United State[s] Edgecumbe Exploration Company, Inc., A-29908 (May 25, 1964); United States v. Ford M. Converse, 72 I. D. 141 (1965), sustained in Converse v. Udall, C[i]v. No. 65-581, in the United States District Court for the District of Oregon

(September 14, 1966), appeal pending; United States v. Stephen B. Millisich, A-30720 (April 13, 1967); United States v. Lucille Lundy, A-30724 (June 30, 1967). As we stated in the Lundy decision:

> "There is a clear distinction between 'exploration' and 'development' as they relate to discovery under the mining laws. The separate stages of mining activity serve as a basis for determining what further mining activity a prudent man would be justified in undertaking. Exploration work, includes such activities as geophysical or geochemical prospecting, diamond drilling, sinking an exploratory shaft or driving an exploratory adit. It is that work which is done prior to a discovery in an effort to determine whether the land is valuable for minerals. When inherently valuable minerals are found, it is often necessary to do further exploratory work to determine whether a valuable mineral deposit exists, i.e., whether the minerals exist in such quality and quantity that there is a reasonable prospect of success in developing a paying mine."

The recognition of this distinction is not new. As early as 1894, the Supreme Court, after reviewing the basis for the claim of a discovery in Chrisman v. Miller, supra, stated that:

> "* * * [The testimony] does not establish a discovery. It only suggests a possibility of mineral of sufficient amount and value to justify further exploration." 197 U.S. at 320.

The Court then proceeded to quote with approval from Justice Field's dissenting opinion in Iron Silver Mining Company v. Mike and Starr Gold and Silver Mining Company, 143 U.S. 394, 412 (1892), that:

> "* * * /T/he mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral. * * *" (Emphasis added).

The Department has also refused to accept as the equivalent of discovery deductions or opinions with respect to the existence of valuable mineral deposits which are based upon findings of substantially worthless surface indications of minerals within the limits of a claim or upon the

discovery of valuable mineral deposits outside the claim, or which are based upon known geological facts, regardless of the strength of infere that may arise from the established facts, where the actual body of ore supposed to exist has not been exposed. See East Tintic Consolidated Mining Claim, 40 L.D. 271 (1911); East Tintic Consolidated Mining Co., (on rehearing), 41 L.D. 255 (1912); Rough Rider and Other Lode Claims, 41 L. D. 242 (1911); 2/ Gonzalez v. Stewart, 46 L.D. 85 (1917); United States v. Bunker Hill and Sullivan Mining and Concentrating Company, 48 L.D. 598 (1922); United States v. Arizona Manganese Corporation et al., 57 I. D. 558 (1942).

A factual distinction must be recognized, of course, between the cases just cited and the present situation. Whereas in the former there was no exposure of a mineral-bearing vein or lode within the limits of the claim, in the latter it is not disputed that a vein containing some valuable minerals has been exposed. The question in the former was whether evidence of mineralization was sufficient to establish, by inference, the existence of valuable mineral deposits within the limits of the claims though such deposits had not been physically located, and the Department he that the inferred existence of a valuable mineral deposit was not the e alent of a discovery of such a deposit. Here the question is whether the evidence of mineralization in an exposed vein is sufficient to establis

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2/ The East Tintic decision of 1912 was subsequently vacated upon a different factual finding (East Tintic Consolidated Mining Co., 43 L.D. 79 (1914), and the Rough Rider decision was vacated upon a determination that the rule enunciated thereinshould not be given retroactive effect (Rough Rider and Other Lode Mining Claims, 42 L.D. 584(1913). However, the principles of law set forth in the vacated decisions have been consistently adhered to by the Department in subsequent cases.

by inference, the existence of a valuable deposit of mineral which is expected to be revealed upon further exploration of the vein. Thus the question now before the Department is whether there is a difference between the use of inference to establish the existence of a mineral-bearing vein where the vein itself has not been found and the use of inference to establish the existence of a valuable mineral deposit within a vein where the vein itself has been found but the mineral deposit which it is supposed to contain has not. We think that there is not.

Appellants contend that the witnesses' unanimous recommendations of further exploration show that the claimants have satisfied the requirements set forth in Jefferson-Montana Copper Mines Co., supra, where it was stated:

> "It is clear that many factors may enter into the third element; the size of the vein, as far as disclosed, the quality and quantity of mineral it carries, its proximity to working mines and location in an established mining district, the geological conditions, the fact that similar veins in the particular locality have been explored with success, and other like facts, would all be considered by a prudent man in determining whether the vein or lode he has discovered warrants a further expenditure or not." 41 L.D. 323.

But what is the real significance of the evidence of mineralization that has been found here? It is nowhere suggested that any quantity of material of the quality of the vein matter thus far disclosed would constitute a mineable body of ore. The evidence does not, in fact, establish any mineral quality of any consistent extent. Although appellants have found ore samples with indicated values exceeding $70 per ton, the record does not support a finding that they have found a deposit yielding ore of that quality, or of any other quality, the exploitation of which may be contemplated. The evidence of record indicates that the

values thus far found are spotty, and appellants do not argue otherwise.

Nor does the evidence relating to the geology of the area establish a basis for concluding that there has been a discovery. While it is true that the fact that similar veins in the particular locality have been explored with success is an element to be considered in evaluating the mineral potential of a vein, yet it is only one of a number of elements to be considered, and, in this instance, it seems clear that it is far from a conclusive factor. Appellant Barton, for example, stated at the first hearing that:

> "*** I believe we agree that mineralization in the District occurs in most any of the rocks, that it occurs both in direct relationship to dikes and away from dikes, that there are a variety of structural features that do tend to favor ore deposition particularly in the proximity of dikes or with brecciated areas in the veins, or intersections of the veins. * * *" Tr. 130, 1st hearing.

A similar effect is language cited by the appellants from the Bureau of Mines Information Circular No. 7512 (August 1949) that:

> The Bohemia mining district is a small but intensely mineralized area in western Oregon. For its size, it has made a substantial although somewhat sporadic production of gold throughout a long period of years.* * *
>
> * * *
>
> "The ore shoots are comparatively narrow, tabular bodies occupying fissures in both the diorite and the volcanic rocks. Exploration has not been extensive enough to ascertain whetheror not there is any particular affinity of ore shoots to either of the two distinct types of country rock. None is indicated in the veins now developed.
>
> "Although weak ore mineralization may often be traced continuously throughout the veins, the minable ore bodies are in definite shoots. These are usually distinctly apart, but in a few cases there is a suggestion of a train of linked ore shoots. Contestees' Exhibit No. 1.

The most that can be said from this evidence, and all that the

appellants have asserted, is, as observed by the hearing examiner, that the values of the minerals which have been found are sufficient to induce further exploration. Thus, when appellants assert that "a prudent man would be justified in expending further time and effort with a reasonable prospect to develop a paying mine," it is clear that they mean that a prudent man would be justified in expending further time and effort in exploring for minerals with a reasonable prospect of finding a mineral deposit which could be expected to lead to the development of a paying mine.

As indicated earlier, we see, in principle, no difference between the showing of isolated mineral values, not occurring in a vein, which only suggests the existence of a valuable mineral deposit within the limits of the claim and the showing of isolated values occurring in a vein which only suggests the possible existence of a valuable mineral deposit in the course of the vein. That which is called for in either case is further exploration to find the deposit supposed to exist.

Here it remains undetermined whether or not minerals exist in such quality or quantity as to justify the expenditure of money for the development of a mine and the extraction of the mineral. There is, to be sure, unrefuted testimony as to the similarities between the mineral showings observed on the claims under consideration and the mineral showings on nearby mining claims which led to the development of productive mines. It is equally clear, however, that something more was found on each of those productive claims than has been found here which led in each instance to the development of a mine. It is that "something more"

that the claimants are still looking for which is essential to a discovery, for it is the finding of, rather than the undisclosed existence of, a mineral deposit which constitutes its discovery.

This is not to say that in order to show a discovery a mining claimant must prove conclusively that a particular mineral deposit is valuable for mining. Where ore has been found, the likelihood that ore of the quality found, or of any mineable quality, will continue remains a matter for speculation, and, until a mineral deposit has been exploited through actual mining operations, its true value will remain a matter of uncertainty. Thus, the opinions of experts, based upon knowledge of the geology of the area, the successful development of similar deposits on adjacent mining claims, deductions from established facts--in short, all of the factors which the Department has refused to accept singly or in combination as constituting the equivalent of a discovery--may be, and as a practical matter must be, accepted in determining whether or not a prudent man would be justified in the expenditure of his means with a reasonable anticipation of developing a valuable mine. However, while inference may be relied upon to establish the extent of a particular mineral deposit, it may not be relied upon to establish the existence of that deposit. The showing thus far made with respect to the claims in question, allowing maximum credibility to appellants' factual allegations, would require reliance upon inference to establish the existence of an ore body as well as its quantity and quality, and all that appellants have shown is a possibility that valuable mineral deposits may exist within the limits of the claims. Accordingly, we concur in the hearing examiner's conclusion that appellants have not shown the discovery of a

mineral deposit which would induce the expenditure of means by a prudent man with a reasonable prospect of success in developing a valuable mine.

One other point merits some comment. Since the decision in United States v. Kenneth F. and George A. Carlile, 67 I.D. 417 (1960), the Department has consistently held that the rejection of an application for patent to a mining claim is necessarily a determination that the claim is invalid. This does not necessarily limit a mining claimant in his right to continue to explore for minerals. If the land is still open to mining entry, as it appears to be here, the claimant is free to relocate his claims and proceed with his efforts to find a valuable mineral deposit. The determination that appellants' claims are invalid is simply a finding that no rights have been initiated against the United States by virtue of the appellants' location of the claims and that, if any rights are to be obtained, they must be obtained through a discovery made subsequent to the determination that the existing claims are not valid. Such rights,of course, must be initiated in accordance with the terms and limitations now governing the location of mining claims.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed.

/s/ Ernest F. Hom

Ernest F. Hom
Assistant Solicitor
Land Appeals

THE OPINION OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
OF MARCH 17, 1971

GOODWIN, Judge:

Plaintiffs seek to set aside a decision of the Secretary of Interior denying patents for two mining claims located on National Forest Land.

This controversy began when Harold Barton, Jr., and Kenneth O. Watkins (now deceased), applied for four patents in January of 1958. A mining engineer from the Forest Service examined the claims and approved two and disapproved two.

The Forest Service initiated proceedings to invalidate claims known as Elephant No. 1 and No. 2. A hearing examiner in October 1961 invalidated Elephant No. 1 and No. 2 for lack of a valid discovery of valuable mineral deposits.

Plaintiff appealed to the Director of the Bureau of Land Management, and in November 1962 the Director reversed the hearing examiner. The Forest Service appealed to the Secretary of Interior and a new hearing was ordered. The new hearing, July 1964, resulted once again in a finding against the plaintiff. This decision was affirmed on appeal to the Bureau and again by the Secretary of the Interior. Plaintiff seeks review of the Secretary's final decision. The case is before this court on a substantial record made in the earlier proceedings.

The test whether valuable mineral deposits have been discovered is whether a person of ordinary prudence would expend further labor and money with a reasonable prospect of developing a valuable mine. Chrisman v. Miller, 197 U.S. 313, 322 (1905), quoting from Castle v. Womble, 19

L.D. 455, 457 (1894). A patent cannot be granted where the evidence shows that further expenditures would be required to locate rather than to develop a mine. Henault Mining Company v. Tysk, 419 F. 2d 766, 768 (9th Cir. 1969), cert. den. 398 U.S. 950 (1970); Converse v. Udall, 399 F. 2d 616 (9th Cir. 1968), cert. den. 393 U.S. 1025 (1969).

Plaintiff contends that the Secretary failed to apply the prudent-man test and erroneously applied a test of profitable operation. Profitability is an important consideration in applying the prudent-man test. United States v. Coleman, 390 U.S. 599 (1968). But the record shows that the Secretary understood and followed the prudent-man test.

I have examined the administrative record, and I find that the hearing examiner's findings are supported by evidence. It is not the function of this court to review the weight and the credibility of the evidence nor to draw inferences from evidence that supports conflicting inferences. It is immaterial whether this court would necessarily draw from the evidence the same inferences as those that were drawn by the hearing examiner. The Secretary can be sustained if the record as a whole contains substantial evidence in support of the examiner's findings.

The record in this case reveals that the two rejected claims, like the two claims for which patents were granted, are located in the Bohemia mining district of southeastern Lane County, Oregon. Valuable minerals were discovered in this mining district in the 1860's, and mining activity has continued in the general area more or less sporadically since that time. Most of the area in the immediate vicinity of the two contested claims has been covered by mining claims. Some of the claims have been patented and others have not. Minerals have been

found on many of the claims, and in a few cases producing mines have been developed.

The hearing examiner heard testimony from lay and expert witnesses on both sides of the question, and concluded that further exploration was necessary to determine whether a valuable mine could be discovered on the questioned claims.

The evidence was such that reasonable minds could differ. The Secretary has found that a reasonable man would not be justified in expending further sums in an attempt to find a valuable mineral deposit on either of the contested claims. Based upon the evidence in support of the Secretary's finding, it is my conclusion that the action should be dismissed.

This opinion shall constitute findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52 (a).

/s/ ALFRED T. GOODWIN

United States District Judge

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HAROLD E. L. BARTON,
*Plaintiff-Appellant,*

vs.

ROGERS C. B. MORTON, Secretary of the Department of the Interior of the United States of America,
*Defendant-Appellee.*

No. 71-1991

OPINION

[May 30, 1974]

Appeal from the United States District Court
for the District of Oregon

Before: CHAMBERS, BROWNING, and ELY, Circuit Judges.

BROWNING, Circuit Judge:

Appellant and another[1] applied to the Department of the Interior for patents to two lode mining claims. The applications were denied and the claims held void on the ground that applicants had not shown discovery of a valuable mineral deposit as required by the applicable statutes. 30 U.S.C. §§ 22, 23, 29, 35. Appellant filed this action to obtain judicial review of the Department's ruling. The district court gave judgment for the government. We affirm.

The general legal standards to be applied are well established. "[T]he only statutory standard has been and still is the 'discovery' of 'veins or lodes' containing 'valuable deposits' of the named metals or others." *Converse v. Udall*, 399 F.2d 616, 619 (9th Cir. 1968). Appellant relies upon recognized glosses upon this statutory standard. Thus, the cases have held that whether a

[1]Kenneth O. Watkins, since deceased.

valuable deposit has been discovered is a factual question to be resolved by asking whether "a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine . . . ." *Castle v. Womble*, 19 Interior Dec. 455, 457 (1894), approved in *Chrisman v. Miller*, 197 U.S. 313, 322 (1905).[2] Appellant emphasizes that under this "prudent man" test, "proved ability to mine the deposit at a profit need not be shown." *Adams v. United States*, 318 F.2d 861, 870 (9th Cir. 1963). The question is not "whether assured profits were presently demonstrated, but whether, under the circumstances, a person of ordinary prudence would expend substantial sums in the expectation that a profitable mine might be developed." *Id. See also Barrows v. Hickel*, 447 F.2d 80, 82 (9th Cir. 1971).

There is no dispute as to the material facts. Veins have been exposed on both of the claims at issue. They contain some gold and silver, together with base metals. The mineralization is spotty and uneven. The vein material thus far exposed is not of sufficient value to be mined economically. However, along some veins of this kind on nearby claims, chutes or pockets have been found containing ore of sufficient quality and quantity to be profitably mined. Expert witnesses testified that a prudent man would be justified in tunneling into or along the veins on the claims in search of similar chutes or pockets. This testimony was not controverted.

Appellant contends that this showing precisely meets the "prudent man" test. As appellant puts it, he and his predecessors "have exposed veins which carry so much mineral values that all parties agree that further work is justified and should be carried on to pursue further these same veins with a reasonable expectation that a profitably mineable quantity of such ore will be reached. The basis for the reasonable expectation is that similar veins in nearby mines have yielded profitable ore shoots under comparable geologic conditions."

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[2]This "prudent man" test is complemented by a "marketability test," requiring that it "be shown that the mineral can be 'extracted, removed and marketed at a profit . . . .'" United States v. Coleman, 390 U.S. 599, 600 (1968).

The Department's position is that appellant has not yet discovered a mineral deposit, but is only searching for one, albeit with good prospects for success. No matter how bright those prospects may be, the Department argues, they are not a substitute for actual discovery of the deposit itself. In the Department's view, the "prudent man" test comes into play only after a mineral deposit has been discovered, not before; and it is then applied to determine whether the discovered deposit is "valuable."[3] The Department held that while the evidence shows that further expenditures are justified in exploration for a mineral deposit, what is required is discovery of a mineral deposit of such quality and quantity that further expenditures are justified in the development of a profitable mine.[4]

We drew the same distinction in *Henault Mining Co. v. Tysk*, 419 F.2d 766 (9th Cir. 1969). In that case the claim was adjacent to property on which the Homestake formation had been extensively mined for gold. The Homestake formation dipped toward

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[3]The Hearing Examiner wrote:

> The prudent man rule is not an alternative to the substantive provision of the mining laws requiring the discovery of a valuable mineral deposit. The rule is applicable only in the determination of whether a particular deposit is valuable. In this case, the further expenditure of labor and means would not be directed toward the development of a deposit which has been found but would be directed toward the finding of a deposit which the evidence indicates might be found and could be developed.

[4]On appeal the Assistant Solicitor wrote:

> The most that can be said from this evidence, and all that the appellants have asserted, is, as observed by the hearing examiner, that the values of the minerals which have been found are sufficient to induce further exploration. Thus, when appellants assert that "a prudent man would be justified in expending further time and effort with a reasonable prospect to develop a paying mine," it is clear that they mean that a prudent man would be justified in expending further time and effort in *exploring* for minerals with a reasonable prospect of *finding* a mineral deposit which could be expected to lead to the development of a paying mine (emphasis in original).

Appellant points out that the Department's finding is misstated in a concluding paragraph of the district court's opinion. It is evident from the opinion as a whole, however, that the district court understood the distinction drawn by the Department and approved it.

the claim for which a patent was sought, and outcropped beyond it. Dikes containing some mineral values surfaced within the boundaries of the claim. These dikes were thought to have originated below the Homestake formation and to have penetrated that formation, carrying minerals from the formation to the surface. Valuable ore was expected to be found where the dikes intersected the Homestake formation. Experts testified that the presence of valuable mineral deposits at these points was so probable that in excess of $150,000 should be spent in drilling shafts to reach them. The claimant in *Henault* contended that this uncontradicted testimony satisfied the "prudent man" test. We rejected the argument (419 F.2d at 768-69):

> No vein or lode containing valuable mineral deposits has yet been discovered. The dikes that have been discovered through outcroppings simply constitute an indication that a vein or lode, yet unexposed, may exist at depth. A reasonable prediction that valuable minerals exist at depth will not suffice as a "discovery" where the existence of these minerals has not been physically established.
>
> . . . .
>
> The further exploration by drilling as recommended by Henault's expert is not then in the nature of development of a discovered lode. It is a search for values not yet discovered, the discovery of which would justify development.
>
> Henault's "prudent man," then, is not a prudent mine developer but a prudent prospector (footnote omitted).[5]

Appellant seeks to distinguish *Henault* on the ground that while no veins had been discovered in *Henault*, veins have been discovered here. Appellant contends that these veins, admittedly containing some gold and silver, constitute the required mineral deposit. Appellant argues that he is now "searching for ore shoots, zones of enrichment, within the mineral deposits (veins) which have already been discovered," whereas in *Henault*, "the target was not [a] deeper enriched zone in an already exposed structure but a different . . . mineral deposit altogether, which had not yet been physically encountered on the claims." Appellant con-

[5] *See also* Chrisman v. Miller, 197 U.S. 313, 320, 323 (1905); Converse v. Udall, 399 F.2d 616, 623 (9th Cir. 1968).

tends that tunneling or sinking into the veins on these claims, as uniformly recommended by the witnesses, would not be "exploration" to "discover" a "valuable mineral deposit," but would be "development" of an already discovered deposit into a paying mine.

But a mineralized vein is not the equivalent of a deposit of mineable ore. Such a vein may not contain material of substantial value. In this case, as the Department pointed out, "[i]t is nowhere suggested that any quantity of material of the quality of the vein matter thus far disclosed would constitute a mineable body of ore. The evidence does not, in fact, establish any mineral quality of any consistent extent. Although appellants have found ore *samples* with indicated values exceeding $70 per ton, the record does not support a finding that they have found a *deposit* yielding ore or that quality, or of any other quality, the exploitation of which may be contemplated. The evidence of record indicates that the values thus far found are spotty, and appellants do not argue otherwise" (emphasis in original).

The Department held, and we agree, that there is "no difference between the showing of isolated mineral values, not occurring in a vein, which only suggests the existence of a valuable mineral deposit within the limits of the claim and the showing of isolated values occurring in a vein which only suggests the possible existence of a valuable mineral deposit in the course of the vein. That which is called for in either case is further exploration to find the deposit supposed to exist." *See also Converse v. Udall, supra,* 399 F.2d at 619, 622.

Appellant argues that in practical effect this approach nullifies the "reasonable anticipation" aspect of the "prudent man" test, and is inconsistent with the rule that "proved ability to mine the deposit at a profit need not be shown." *Adams v. United States, supra,* 318 F.2d at 870. We do not agree. Room remains after discovery of the mineral deposit for application of the principle that the claimant need only show a reasonable prospect that a profitable mine will be developed. The margin between a valuable mineral deposit and a profitable mine may be substantial. As the Department said, "Where ore has been found, the likelihood that ore of the quality found, or of any mineable quality, will continue remains a matter for speculation, and, until a mineral deposit

has been exploited through actual mining operations, its true value will remain a matter of uncertainty."[6]

The reason for accepting less than demonstrated profitabilty as a condition to patentability is to encourage the investment of capital in the development of mineral resources.[7] No doubt it would further that purpose to offer the incentive of patentability to "prudent" prospectors as well as "prudent" mine developers. But there are other considerations. A patent passes ownership of public lands into private hands. So irrevocable a diminution of the public domain should be attended by substantial assurance that there will be a compensating public gain in the form of an increased supply of available mineral resources. The requirement that actual discovery of a valuable mineral deposit be demonstrated gives weight to this consideration.

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[6]The Assistant Solicitor continued:

> Thus, the opinions of experts, based upon knowledge of the geology of the area, the successful development of similar deposits on adjacent mining claims, deductions from established facts—in short, all of the factors which the Department has refused to accept singly or in combination as constituting the equivalent of a discovery—may be, and as a practical matter must be, accepted in determining whether or not a prudent man would be justified in the expenditure of his means with a reasonable anticipation of developing a valuable mine. However, while inference may be relied upon to establish the *extent* of a particular mineral deposit, it may not be relied upon to establish the *existence* of that deposit. The showing thus far made with respect to the claims in question, allowing maximum credibility to appellants' factual allegations, would require reliance upon inference to establish the existence of an ore body as well as its quantity and quality, and all that appellants have shown is a possibility that valuable mineral deposits may exist within the limits of the claims (emphasis in original).

[7]As stated in Castle v. Womble, 19 Interior Dec. 455, 457 (1894):

> to hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby "all valuable mineral deposits in lands belonging to the United States . . . . are . . . declared to be free and open to exploration and purchase." For, if as soon as minerals are shown to exist, and at any time during exploration, before the returns become remunerative, the lands are to be subject to other disposition, few would be found willing to risk time and capital in the attempt to bring to light and make available the mineral wealth, which lies concealed in the bowels of the earth, as Congress obviously must have intended the explorers should have proper opportunity to do.

Denial of a patent does not bar a claimant from continuing the search for a valuable mineral deposit; it only withholds passage of title until that discovery is made.[8]

Affirmed.

[8]In closing the opinion for the Department on appeal, the Assistant Solicitor stated:

> One other point merits some comment. Since the decision in *United States v. Kenneth F. and George A. Carlile*, 67 I.D. 417 (1960), the Department has consistently held that the rejection of an application for patent to a mining claim is necessarily a determination that the claim is invalid. This does not necessarily limit a mining claimant in his right to continue to explore for minerals. If the land is still open to mining entry, as it appears to be here, the claimant is free to relocate his claims and proceed with his efforts to find a valuable mineral deposit. The determination that appellants' claims are invalid is simply a finding that no rights have been initiated against the United States by virtue of the appellant's location of the claims and that, if any rights are to be obtained, they must be obtained through a discovery made subsequent to the determination that the existing claims are not valid. Such rights, of course, must be initiated in accordance with the terms and limitations now governing the location of mining claims.

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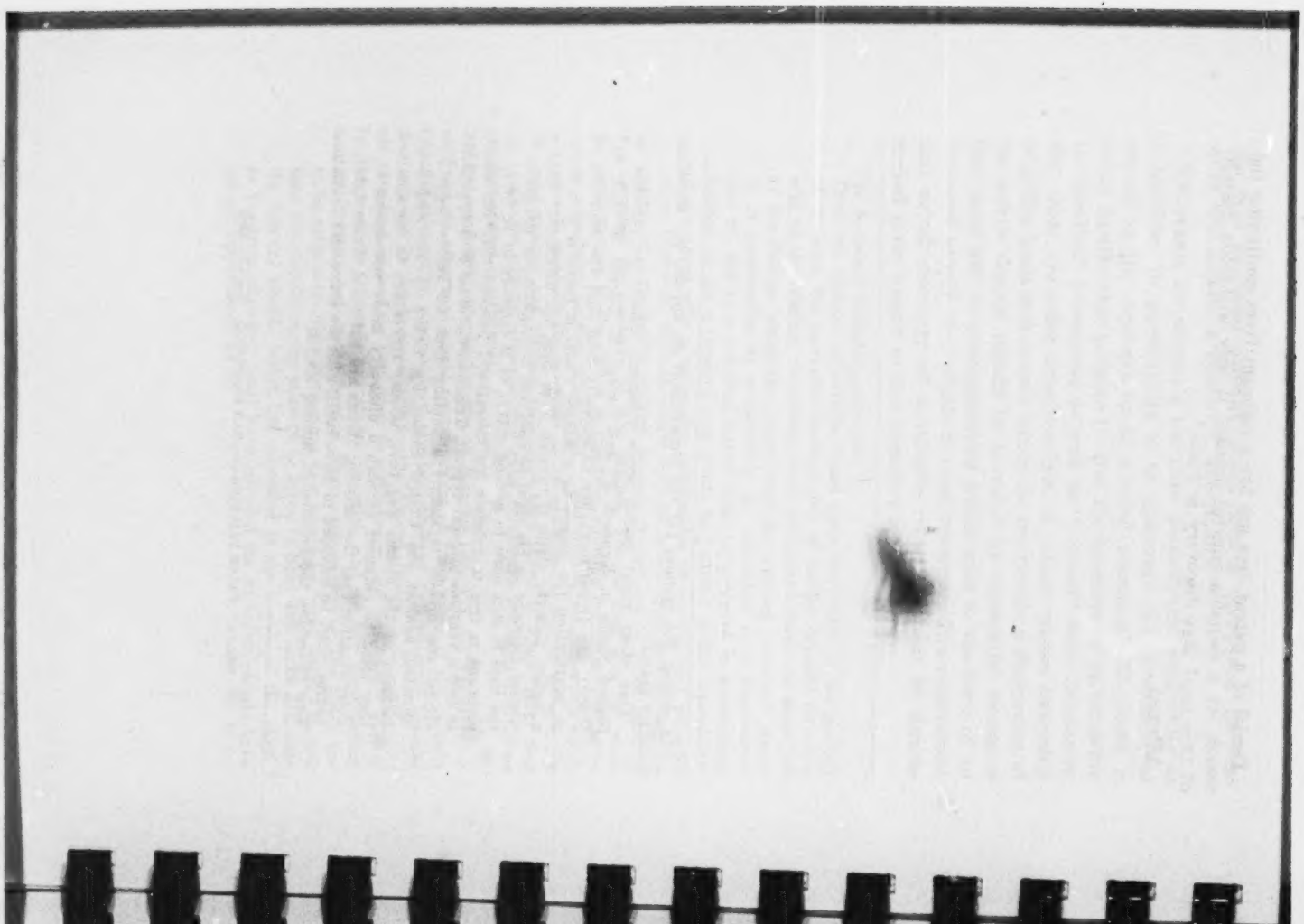

Mr. HANSEN. Mr. President, I note that this measure like so many others that affect mining is subject to provisions of the Administrative Procedure Act. Recently we had the surface mining bill with provision for determinations to be made by following the provisions of the Administrative Procedure Act. Other mining laws now administered by the Department of the Interior have similar requirements. Too many owners or operators who are affected by this provision are not just sure what it means. They wonder if in having their rights determined in this manner they are being denied their day in court.

I see my friend the distinguished Senator from Nebraska, the ranking member on the Senate Judiciary Committee and former chairman of the Subcommittee on Administrative Practice and Procedure, here and I direct my question to him: What do these provisions regarding determinations under the Administrative Procedure Act mean for an owner or operator who may find himself in disagreement with the officials of the agency in charge of carrying out an act or determining his rights?

Mr. HRUSKA. I thank my colleague. Basically, the reference to the Administrative Procedure Act in a bill was put in there as a protection to the property owners or operators against the possibility of overzealous administrative action. Any conflict arising out of the administration of an act would have to be handled through proceedings of administrative tribunals under the Department of the Interior if that is the agency charged with enforcement. Before any citizen could be deprived of any substantial right, he would be given due notice of the charge brought by the enforcing agency and given a hearing in an administrative court.

Mr. HANSEN. Administrative trial is meaningless to an owner or operator. He thinks he is being denied his day in court. The judge is an employee of the agency. If he is bold enough to make a decision favorable to an owner or operator, he can be, and usually is, reversed by higher administrative authority. The lawyer who handles the case for the complaining agency is often an assistant to the lawyer for the appellate administrative agency to whom the Secretary delegates the final decision. The administrative court system has aroused a great deal of resentment among persons affected by displaying more interest in carrying out administrative policy dictated by department heads than they show for the rights of citizens.

What protection does a citizen have if the administrative court hands him an unfair decision, How does he really get his day in court, as we know it, if he ever does?

Mr. HRUSKA. If an owner or operator is dissatisfied with the way the administrative tribunals have handled the case brought against him, and if he is not economically exhausted by the fight on the administrative levels, he can obtain judicial review of the final administrative decision in the Federal courts. The U.S. District Courts are given jurisdiction to review and to set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, contrary to constitutional right, or not supported by substantial evidence, or unwarranted by the facts. That is the substance of title 5, United States Code, section 706, in the Administrative Procedure Act.

Mr. HANSEN. I realize that Congress intended to protect the rights of citizens by the Administrative Procedure Act, but as a practical matter do the courts make a meaningful judicial review of administrative actions and decisions? What about the complaints we get that the Federal judges are unduly influenced by the decisions of the administrative courts and hesitates to reverse bureaucratic action? Particularly, the courts' track record in mining cases to date has shaken the citizen's faith in the courts. They feel that the judges never fully review the record, never attempt to determine if there is proof to substantiate the administrative findings and decisions, rather that they take the easy way out by saying that there was evidence, without giving it weight, to uphold the agency finding. Judicial review is a farce if the courts are going to put a rubber stamp of approval on whatever decision Interior has made. We hear as I have said all too often that the Federal judges are so impressed by Interior's claim of having expertise in matters connected with the public lands and with mining that the judges adopt the administrative conclusions and affirm the administrative decisions without really reviewing the record in the case, so long as Interior's attorneys can point to some evidence to support the decision brought in for review.

Mr. HRUSKA. The courts remain the only protection for a citizen's constitutional rights which our governmental framework offers. It may help somewhat

If we go on record here as to what Congress intended to accomplish by writing into the Administrative Procedure Act the provision for judicial review of administrative action. The courts should not be rubberstamps; it is their duty to protect the citizens against bureaucratic injustice. Congress intended that the courts should review administrative decisions critically. If the decision below was wrong, if it was contrary to the evidence in the record, the court should reverse. Reverence for Interior's expertise and policy should not cause the court to wield any rubberstamp of approval for such a decision. And the same principle applies to review of administrative decisions from other departments.

The way the Administrative Procedure Act is meant to be carried out, the administrative law judges are expected to make specific findings as to the evidentiary facts in each case they hear and to frame their ultimate conclusions accordingly. If the case is brought up for judicial review, the reviewing court is not intended to dispose of the case merely by looking for some evidence in the record to support the decision below. The reviewing court should consider whether or not each of the rulings on evidentiary fact is supported by substantial evidence. The courts should not adopt uncritically findings of ultimate fact made below simply because they are labeled "findings," when they are really conclusions.

The reason why it is essential for the judge who hears the evidence to make specific findings of evidentiary fact was pointed out in Saginaw Broadcasting Co. against the Federal Communications Commission. Judge Stephens came right out with the statement that—

> The requirement of findings is far from a technicality. On the contrary, it is to insure against Star Chamber methods, to make certain that justice shall be administered to facts and law. This is fully as important in respect of commissions as it is in respect of courts.

When the trial judge bases his conclusions upon specific evidentiary findings, these furnish to a reviewing court the foundation upon which to base an intelligent review of the decision. And the reviewing court should not shrink from the sometimes laborious task of examining the record to evaluate the findings made below. The Administrative Procedure Act, section 706 of title 5 of the United States Code, makes it the duty of the reviewing court to review the whole record, or such portions thereof as may be cited by any party, and to take due account of the rule of prejudicial error.

stances of bureaucratic injustice, the Constitution becomes only a scrap of paper.

Mr. HANSEN. I thank my colleague. This will be most reassuring to those who have expressed concern over administrative tribunals and the courts.

Mr. HRUSKA. Our form of government must necessarily make use of administrative agencies, and the course of history has shown many times and in many countries that the inevitable tendency of agencies is to reach out for increasing power, to expand the scope of their authority and the number of their personnel until what President Franklin Roosevelt called the fourth branch of government becomes truly a bureaucracy. And, more recently the Senator from Arizona, Senator GOLDWATER, expressed similar concern about the bureaucracies. Power alters the perspective of the persons who wield it, and particularly where agencies administer large areas of public resources, there is a tendency to create and enlarge a Federal empire which is inside the 50 States, but really independent of them.

The temptation to consolidate that empire by dispossessing citizens of property rights lawfully acquired under acts of Congress is a strong one. To a zealous bureaucrat the project may look a righteous crusade, while the citizen screams "Confiscation." The task of preserving our kind of country, one where a citizen's constitutional rights are a reality, so that it will not turn into a bureaucracy where those rights have no meaning, calls for the courts to check and correct administrative abuse of power.

Mr. HANSEN. I thank my distinguished colleague for making this record. It will help greatly to alleviate the fears that have been expressed to me by owners and operators.

# In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-199

HAROLD E. L. BARTON, PETITIONER

*v.*

ROGERS C. B. MORTON, SECRETARY OF THE DEPARTMENT OF THE INTERIOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The only question properly presented by the petition is whether the factual determination by the Secretary of the Interior that petitioner had not discovered valuable minerals as of the date of his application for a patent of public lands was supported by substantial evidence.

1. Petitioner and another applied to the Department of the Interior for patents to two lode mining claims. The Secretary of the Interior held the claims void for lack of discovery of valuable mineral deposits and petitioner brought this suit to obtain judicial review of the Secretary's determination. The district court entered summary judgment in favor of the Secretary and dismissed the action (Pet. App. A38-A40). The court of appeals, in a thorough opinion on which we rely, affirmed (Pet. App. A41-A47).

The evidence showed that Barton had exposed veins on both claims, containing some gold and silver and base metals, but no exploitable deposits. Experts testified that the exposed veins justified tunneling in search of chutes or pockets, and petitioner argued that, because a prudent man would undertake further work, he had discovered valuable minerals justifying a patent. The Secretary contended that, as petitioner had not yet discovered a mineral deposit but was only searching for one, he had not made the discovery required by the Mining Law (30 U.S.C. 22, *et seq.*; Pet. App. A41-A43).

The court of appeals held that petitioner's findings of samples in a vein did not support his claim of discovery of a valuable deposit entitling him to a patent. The court noted that no difference exists between a showing of isolated mineral values not occurring in a vein, which only suggests the existence of a valuable mineral deposit within the limits of the claims, and the showing of isolated values occurring in a vein. In either case what is called for is further exploration, which does not support a demand for a patent of public lands (Pet. App. A45). The court explained why the prudence of exploring further does not justify a patent (Pet. App. A46): "A patent passes ownership of public lands into private hands. So irrevocable a diminution of the public domain should be attended by substantial assurance that there will be a compensating public gain in the form of an increased supply of available mineral resources. The requirement that actual discovery of a valuable mineral deposit be demonstrated gives weight to this consideration."

In conclusion, the court noted (Pet. App. A47) that denial of a patent did not bar petitioner from continuing the search for a valuable mineral deposit and

later receiving a patent; it only withholds passage of title until that discovery is made.

2. The decision of the court of appeals is correct, and is supported by a long history of consistent administrative and judicial construction of the relevant statutes. It does not conflict either with decisions of other circuits, or with any decision of this Court.

To establish a "discovery" entitling him to a patent, a mineral lode claimant is required to expose physically, within the limits of his claim, a vein or lode of mineral-bearing rock in place, possessing in and of itself a present or prospective value for mining purposes. Speculation, hope, and the like have been held insufficient time and time again.[1]

The court of appeals concluded that, while petitioner "ha[d] found ore *samples* with indicated values exceeding $70 per ton, the record does not support a finding that they have found a *deposit* yielding ore of that quality, or of any other quality, the exploitation of which may be contemplated" (Pet. App. A33; emphasis in original). Contrary to petitioner's assertions (Pet. 7), as we have shown, neither the Secretary nor the courts require a claimant to provide "demonstration evidence by exploitation of the deposit" before a patent will issue, but he must have found, not merely suspect that he may find, an exploitable deposit.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*

OCTOBER 1974.

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[1] *United States* v. *Coleman*, 390 U.S. 599, 602; *Cole* v. *Ralph*, 252 U.S. 286, 299; *Cameron* v. *United States*, 252 U.S. 450, 459; *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 335-336; *Chrisman* v. *Miller*, 197 U.S. 313, 322; *United States* v. *Iron Silver Mining Co.*, 128 U.S. 673, 683; *Converse* v. *Udall*, 399 F. 2d 616, 620-621 (C.A. 9), certiorari denied, 393 U.S. 1025; *Henault Mining Co.* v. *Tysk*, 419 F. 2d 766, 768-769 (C.A. 9), certiorari denied, 398 U.S. 950; *Udall* v. *Snyder*, 405 F. 2d 1179, 1180 (C.A. 10), certiorari denied, 396 U.S. 819.